STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARL J. DANIELS,

Defendant-Appellant.

UNPUBLISHED
August 12, 2003

No. 237010
Wayne Circuit Court
LC No. 99-003481

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 50 or more but less than 225 grams of heroin, MCL 333.7401(2)(a)(iii), and sentenced to ten to twenty years' imprisonment. He appeals as of right. We affirm.

During a police raid of defendant's home, one officer saw defendant and another man in the kitchen. As the officer entered the room, defendant pushed a kitchen drawer shut with his left hand and stepped away from the cabinet. Two bags of heroin weighing approximately 176 grams were confiscated from that drawer. On a dining room table, police officers found a scale commonly used to measure drugs. A total of $8,430 was found in an upstairs bedroom.

The officer who found the heroin in the kitchen drawer, Officer Bryan Watson, testified that he showed the raid crew chief the drawer. The crew chief, Sgt. Michael Lee, confirmed that Watson showed him the drawer, although Lee's written report did not refer to it.

The primary defense was that there was doubt about whether the drugs were found in the kitchen drawer or in a guest's bedroom.

I. Limitations on Defendant's Proofs

Defendant argues that the trial court improperly precluded him from presenting certain witnesses and evidence in support of his defense. Defendant challenges four separate rulings by the trial court.

A defendant has a fundamental due process right to present a defense. *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). That right is not absolute, however, and must in some cases be weighed against the need for "established rules of procedure

and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). The balancing of these competing interests is within the discretion of the trial judge. *People v Holguin*, 141 Mich App 268, 271; 367 NW2d 846 (1985).

A. Medical History

Defendant first argues that his wife should have been permitted to testify about his medical history and physical limitations to rebut the police officer's testimony that he shut the drawer with his left hand. In his brief, defendant does not identify the physical limitation that he claims would rebut the officer's testimony. In an offer of proof made outside the jury's presence, defense counsel offered that defendant had limited use of his left hand due to an accident several years earlier. The court excluded the evidence because it was a subjective medical complaint related by a person (defendant's wife), who did not have direct medical knowledge of defendant's condition.

Although lay testimony about general medical conditions observed by a witness is ordinarily permitted, *McPeak v McPeak (On Remand)*, 233 Mich App 483, 493; 593 NW2d 180 (1999), we are not persuaded that the trial court denied defendant his constitutional right to present a defense under these facts. A police officer testified that defendant closed the kitchen drawer with his left hand. Defendant offered only a generalized version of his medical condition without demonstrating that the simple, uncomplicated movement of pushing a drawer shut could not have occurred. Absent more details, defendant has not shown that he was denied his constitutional right to present a defense by the trial court's ruling.

B. Evidence Found Upstairs

Defendant next argues that his wife should have been permitted to testify that one female officer on the raid team came down the steps with a plastic bag and stated, "I got it. Somebody missed it. I got it," to which other officers responded, "Atta girl. You did it." The prosecutor objected to the proposed testimony as hearsay and ambiguous. Defendant argued that the statements were admissible under MRE 803(1) (present sense impression) or MRE 803(2) (excited utterance). The trial court ruled that the proposed testimony was not admissible under MRE 803(1) or (2), and further, to the extent it could be considered admissible, it should be excluded under MRE 403 because it lacked probative value and would be confusing to the jury, inasmuch as the jury would be left to speculate about the contents of the bag and the room from which it was confiscated.

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *People v Bowman*, 254 Mich App 142, 145; 656 NW2d 835 (2002). We agree with the trial court. Defendant assumes that the officers' vague statements are an indication that the bag contained heroin, and that it was found in the guest bedroom. However, the sole female officer on the raid team testified that she found money upstairs in a bedroom. No one testified that drugs were found upstairs. Because there was no evidence suggesting that drugs were found upstairs, and because the officer's vague statement does not identify the item referenced or the location from which it was confiscated, the court did not abuse its discretion in determining that the proposed evidence lacked probative value and instead would have been confusing and had a tendency to mislead the jury. MRE 403. Furthermore, apart from MRE 403, the officers'

comments would constitute hearsay, MRE 801(a), and defendant failed to establish their admissibility under either MRE 803(1) or (2). The statement "I got it—Somebody missed it—I got it" was not made until an undetermined time after the officer found the item and, therefore, the court properly found that it did not qualify as a present sense impression and excluded it. MRE 803(1); *Bowman, supra*, 254 Mich App 145-146. Additionally, the statement does not qualify as an excited utterance under MRE 803(2), because there is no suggestion that it arose from a truly startling event. *Id.* at 146-147.

Accordingly, the trial court did not abuse its discretion by excluding the proposed testimony.

C. Father's Testimony

Next, defendant argues that the trial court improperly precluded his father from testifying that he lived in defendant's home for a while and knew the furniture arrangements in the bedrooms, that he saw a guest sleeping on a living room sofa bed, and that the kitchen drawer was missing. The court ruled that the testimony would be cumulative and a "waste of time."

We agree that the proposed testimony about the furniture and an unidentified man was irrelevant. The proposed testimony was not tied to the date of the offense in any way. We are troubled, however, by the trial court's decision to prohibit defendant's father from testifying because his testimony would be "cumulative."[1] Although MRE 403 allows a court to exclude evidence as cumulative, we do not believe the additional perspective of a third defense witness is a "needless" presentation, particularly on a hotly contested issue where even the defendant's photographic evidence was challenged by the prosecution. MRE 403.[2] Nonetheless, because defendant's mother and wife both testified that the drawer was missing, defendant has not shown that he was denied his right to present a defense. This evidentiary error does not rise to constitutional error.

D. Enforcement of Subpoena

Finally, defendant argues that the court erred by failing to enforce a defense subpoena to produce the manager of the rented house. Defendant sought to have the manager testify that the drawer was missing, and that defendant's family was no longer living in the apartment on August

[1] We note that, in a separate issue addressed below, the prosecutor argues that it is proper to argue to the jury that defense evidence was uncorroborated. Corroboration comes from cumulative evidence. Although not raised in this case, it would seem disingenuous for a court to exclude defense testimony as cumulative and unfairly open the door for the prosecutor to argue that a defense position is uncorroborated.

[2] The rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or *needless presentation of cumulative evidence.* [Emphasis added.]

2, 1999.[3] The manager was served with a subpoena duces tecum. When he failed to appear as scheduled, defendant sought to have an arrest warrant issued. The court declined the request, preferring to wait until after the lunch recess before considering that harsh option. After the lunch recess, defendant disclosed that he had reached the witness, who informed him that the documents he was seeking were no longer available due to water damage. The trial judge indicated that there would be no need to put the witness on the stand to establish that the records were unavailable. At that time, defendant did not disagree with the court and did not request further enforcement of the subpoena. Under the changed circumstances, we conclude that defendant forfeited this issue. If defendant still desired an arrest warrant, he was obligated to renew the request. Because defendant failed to preserve this issue, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no plain error. The failure of a witness under subpoena to appear constitutes a contempt of court. MCR 2.506(E)(1). The trial court has broad discretion to determine the appropriate remedy for contempt. *People v Ahumada*, 222 Mich App 612, 617-618; 564 NW2d 188 (1997). Because the missing witness' sole anticipated testimony would merely have confirmed that documents were no longer available, the court's decision to refrain from arresting the witness did not constitute plain error.

II. Response to Jury Question

During deliberations, the jury sent a note to the court asking "does the fact that drugs were found in Daniels' house prove possession on Daniels part?" Defendant requested that the trial court instruct the jury that the answer is "no" and, if the jury was still confused, the court should re-read the possession instruction that was previously given. The court declined defendant's request, and instead re-instructed the jury on the elements of the offense and the definition of possession. Defendant argues that the court's instruction essentially answered the question "yes" and directed a guilty verdict. We disagree.

A simple "no" answer would not have accurately stated the applicable law. The presence of drugs in a defendant's home is but one factor to be weighed in considering whether the defendant possessed the drugs. While it is true that mere presence alone does not show possession, *People v Echevarria*, 233 Mich App 356, 370; 592 NW2d 737 (1999), the jury did not ask whether that one factor, standing alone, was conclusive. A trial court's response to a jury question is reviewed for an abuse of discretion. *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998). Here, the court did not abuse its discretion when it declined to give a conclusive answer to a broader inquiry, and instead reinstructed on the applicable law.

III. Prosecutor's Conduct

[3] The background of a birthday party photograph showed that the drawer was missing. The photo had an imprinted date of "8-2-99," which defendant argued showed that the photograph was taken on "8 February 1999," the date of his son's birthday (the grandmother testified that February 8 was her grandson's birthday). The prosecutor argued that it was more likely that the imprint represented the date "August 2, 1999." Alternatively, the prosecutor argued that the date on the camera could have been reset, an argument addressed *infra*.

A. Impeachment by Prior Conviction

Defendant argues that the prosecutor committed misconduct when she attempted to impeach a witness by asking whether she had been convicted of any crime involving theft or dishonesty, with knowledge that the witness did not have a conviction within the relevant ten-year time restriction of MRE 609(a). When the prosecutor asked defendant's wife about prior arrests for theft or dishonesty, she testified that, as a teen, she was charged with shoplifting, but not convicted. On appeal, the prosecutor agrees that it was error to ask the witness about prior convictions without knowing in advance whether the witness had relevant convictions within the rule's time frame. See *People v Layher*, 464 Mich 756, 766; 631 NW2d 281 (2001) discussing *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973). The prosecutor argues, however, that the error could have been negated by a timely instruction upon request.[4] Defendant, on the other hand, argues that no instruction could have cured the error.

After reviewing the record, we agree with the prosecutor. A timely instruction could have cured the improper reference to the witness' past contact with the criminal justice system. *People v Thompson*, 101 Mich App 609, 616-617; 300 NW2d 645 (1980).

B. Argument Regarding Photograph

Defendant argues that the prosecutor committed misconduct by arguing in closing that the date on the birthday photograph could have been tampered with by changing the imprint date on the camera. We find no error. The prosecutor properly could argue the reasonable inference that clocks can be reset. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (prosecutor can argue the evidence and all reasonable inferences arising from it).

C. Argument Regarding Lack of Corroboration

Defendant argues that the prosecutor shifted the burden of proof by arguing in closing that the testimony of defendant's wife, that the birthday photograph was taken on February 8, 1999, was uncorroborated. The court overruled defendant's objection, calling it a fair comment on the evidence. We find no error. It is not improper for a prosecutor to argue that a defense position is uncorroborated. See *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996), aff'd 460 Mich 55 (1999).[5] Such an argument is directed at the weight to be given to a

[4] The prosecutor also argues that there was no prejudice because the witness did not have any relevant convictions within the ten-year time limit. We disagree with this argument. Any unfair prejudice flows from the suggestion of criminal activity which did not result in a conviction, or from convictions not involving theft or dishonesty, or from convictions occurring outside the rule's time frame. We might agree that there is no prejudice where an improperly crafted question ends up disclosing that a properly admissible conviction involving theft or dishonesty actually occurred within the ten-year period, but it is disingenuous to suggest that there is no prejudice where the prosecution solicits improper evidence and is unable to prove proper evidence. The inability to prove a properly admissible conviction heightens the prejudice to a defendant, it does not diminish or abolish it.

[5] But see footnote 1.

defendant's evidence and does not improperly shift the burden of proof to defendant. *People v Fields*, 450 Mich 94, 116-118; 538 NW2d 356 (1995).

IV. Cumulative Effect

Defendant argues that the cumulative effect of the claims outlined above denied him a fair trial under the state and federal constitutions, Const 1963, art 1 § 20; US Const, Ams VI, XIV. We disagree. The cumulative effect of the errors discussed above did not deprive defendant of a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001).

V. Mandatory Minimum Sentence

We will not address this issue on appeal since we granted defendant's motion to withdraw his supplemental brief regarding the argument.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell